AMERICAN CIVIL LIBERTIES UNION

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May 7, 1997

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

TO WHOM IT MAY CONCERN:

I am enclosing for the Commissioner's review nine copies of the American Civil Liberties Union reply comments on Industry Proposal for Rating Video Programming (CS Docket No. 97-55). We would appreciate it if the Office of the Secretary made sure that these documents are distributed to each Commissioner.

Thank you for your cooperation.

Sincerely,

Laura W. Murphy

Laura W. Murphy
Director

LWM/cld

Enclosure

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Industry Proposal for Rating Video Programming — CS Docket No. 97-55

REPLY COMMENTS OF THE AMERICAN CIVIL LIBERTIES UNION

Introduction

The American Civil Liberties Union is a nearly century-old national nonprofit organization dedicated to protecting the constitutional rights and liberties guaranteed to all Americans. Foremost among these rights is the First Amendment freedom of expression, which protects art and entertainment as surely as social commentary and political debate. The ACLU believes that government-prescribed "ratings" systems that single out sex, violence, or other controversial subjects for adverse treatment conflict with the fundamental principles of free expression enshrined in the First Amendment. The ACLU accordingly urges the Commission to resist the pleas of those dissatisfied with the television industry's new labeling system,[1] and to refrain from getting into the business of government censorship by "prescribing" ratings pursuant to '551 of the 1996 Telecommunications Act.

[1] The ACLU takes no position on the wisdom or efficacy of the industry's system.

I. AN FCC-"PRESCRIBED" RATINGS SYSTEM WOULD BE INHERENTLY COERCIVE AND UNCONSTITUTIONALLY DESIGNED TO SUPPRESS SPEECH ABOUT UNPOPULAR SUBJECTS AND IDEAS

Sections 551(b) and (e) of the Telecommunications Act[2] direct the FCC to "prescribe" "guidelines and recommended procedures for the identification and rating of video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children," but only if the Commission determines that the television industry has not itself established "acceptable" "voluntary rules" for labeling programs. Despite the law's use of ambiguous words like "prescribe" and "recommended," in reality, the intent and effect of any FCC-prescribed rating system would be coercive.[3]

This is because the FCC has the power of economic life and death over television broadcasters. It not only grants and revokes broadcast licenses, but passes on requests for permission to transfer, renew, or modify licenses, and to acquire new stations. See 47 U.S.C. '307. In making these licensing decisions, the agency considers the general conduct of license holders, including the content of their programming, under a broad "public interest" standard. 47 U.S.C. ''303-309.[4] Broadcasters are unlikely to antagonize the agency

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[2] Codified in part at 47 U.S.C. '303(w).

[3] The House Conference Report No. 104-458 on the Telecommunications Act of 1996 states that the law is not intended to empower the Commission to "require the adoption of the recommended rating system." 1996 U.S. Code Congressional & Admin. News 209. However, as the Committee on Communications & Media Law of the New York City Bar Association has observed, "[q]uery whether this legislative rationale is sufficient to transform the coercive force of this statute, given the FCC's coercive power over broadcast licensees." "Violence in the Media: A Position Paper," The Record of the Association of the Bar of the City of New York Vol. 52, No.3 (April 1997), p. 337 n.241.

[4] The Commission can also make life difficult for broadcasters short of actual adverse licensing decisions. If it "prescribes" a rating system, there can be little doubt that members of the public will begin to file complaints with the agency regarding alleged deviations from the "guidelines."

that regulates their conduct, and thereby prejudice their present and future business opportunities, by ignoring a ratings system "prescribed" by the Commission. Indeed, the television industry's acquiescence last year to the Act's suggestion that it establish "voluntary" ratings, after publicly proclaiming its objection to such legislative pressure, demonstrates the power of government to coerce industry compliance. An FCC-"prescribed" ratings system would thus likely be perceived as mandatory, and much of the television industry would, however reluctantly, feel compelled to follow it.

The First Amendment objections to such a government labeling scheme are threefold. First, government ratings are a form of "forced speech." That is, mandating labels compels private individuals and companies to say things about their creative offerings that they have no wish to say, and even puts the words into their mouths. The Supreme Court has made clear that such compelled speech is as much a violation of First Amendment rights as enforced silence. See, e.g., Riley v. National Federation of the Blind, 487 U.S. 781, 797 (1988); Pacific Gas & Electric Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986); Wooley v. Maynard, 430 U.S. 705, 714 (1977).

Second, the categories of expression singled out by '551 for adverse treatment through labeling are inherently and hopelessly vague. "Violent" material is a vast category, encompassing programming with historical, literary, artistic, and news value (not to mention the entertainment value of sports, war stories, and Westerns). The American Psychological Association has commented that "[t]elevision violence per se is not the problem; rather, it's the

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Investigation of such complaints would be an effective way of pressuring distributors, producers, directors, and writers of television programs to fall into line.

manner in which most violence on television is shown that should concern us."[5] But trying to distinguish between "excessive" or "gratuitous" violence on the one hand, and violent material presented in an instructive or morally approved way, as the APA suggests, would enmesh the government hopelessly in an unconstitutional process of policing thought and censoring ideas. As Professor Burt Neuborne recently pointed out:

> The impossibly broad reach of a literal ban on all speech depicting violence inevitably requires a narrowing set of criteria designed to distinguish Hamlet from forbidden speech depicting violence. But any effort by the FCC, or anyone else, to decide when speech depicting violence crosses the line from an acceptable exercise in artistic creation, as in Hamlet, or Oedipus Rex, or Antigone, or The Crucible, to a forbidden depiction of "gratuitous" or "excessive" violence must involve purely subjective notions of taste and aesthetic judgment. Indeed, once it is recognized that the ban on violence cannot be applied literally, any effort to apply a narrower ban is utterly without objective guidance. In effect, efforts to ban violent programming would turn the FCC into a drama critic, forced to pass judgment on the artistic merits of any effort to depict a violent act.

Burt Neuborne, Testimony to the Senate Commerce, Science and Transportation Committee, Feb. 26, 1997. The problems of definition and interpretation that Professor Neuborne identifies inhere equally in a ratings system as in a direct ban.

The Supreme Court 30 years ago struck down as unconstitutionally vague a government rating scheme for movies that was designed to shield minors from sexual or violent content.

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[5] Comments of the American Psychological Association (April 8, 1997), p. 3.

Interstate Circuit v. Dallas, 390 U.S. 676 (1968). The Court explained that vagueness is "not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression." Id. at 688-89. Virtually every other judicial decision addressing governmental regulation of "violent" media content has come to the same conclusion. See, e.g., Winters v. New York, 333 U.S. 507, 514-20 (1948); Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 689 (8th Cir. 1992); Davis-Kidd Booksellers v. McWherter, 866 S.W.2d 520, 530-32 (Tenn. 1993) (all invalidating laws regulating violent expression on vagueness grounds).

Finally, any FCC-prescribed ratings system would have the unconstitutional purpose and effect of restricting expression because it is unpopular or controversial. Section 551 of the Telecommunications Act explicitly states its purpose of suppressing disfavored subject matter ("sexual, violent, or other indecent material"). Congress in ' 551(a) emphasized its hostility toward "violent video programming" and "casual treatment of sexual material on television," and its "findings" that these subjects have "negative influences" on children.[6] The Act's requirements that new television sets "be equipped with a feature designed to enable viewers to block display of all programs with a common rating" (' 551(c)), and that the industry "transmit such rating to permit parents to block the display of video programming that they have determined is inappropriate for their children," ' 551(b)(2),[7] make even plainer Congress' desire to reduce the

[6] Several of the commenters in this proceeding echo Congress' censorial purpose; see, e.g., Comments of the Center for Media Education et al., p. 4 (describing "fundamental goal" of the Act as "combating the adverse effects of televised violence"); March 25, 1997 Letter/Petition Signed by Various Individuals ("we urgently request that you take action to rid the TV screen of the violence, sex, anti-Christian innuendoes, profanity and homosexual programs").

[7] Of course, parents would not in fact be deciding that particular programs are "inappropriate for their children," since under any labeling scheme it is the rater, not the parent, who initially determines whether a program deserves to receive a "V," "S," "TV-14," or other conclusory and restrictive code.

viewership, and corresponding ability to attract advertising, of any program broadly defined to contain "violent" or "sexual" subject matter. The inevitable coercive pressure on those creating video programming to self-censor in order to avoid adverse ratings was plainly intended.

Ratings prescribed by the FCC pursuant to the Act can therefore hardly be defended as an innocuous effort to empower parents by supplying them with neutral information. A truly noncoercive effort to inform parents, rather than censor what the government believes to be "negative" or dangerous ideas, would not rely on the minimal, inevitably misleading information conveyed by a letter or code that can be read by a computer chip. Parents are better served by fuller information (descriptions or reviews) that explains the context in which violent or sexual material is presented, and that enables them to make viewing decisions based on their own values and childrearing philosophies, and the personal maturity levels of their children.

The Supreme Court has recognized that governmental suppression of speech may be accomplished not just directly but also through "more subtle" forms of interference, Bates v. Little Rock, 361 U.S. 516, 523 (1960) -- through "inhibition as well as prohibition." Lamont v. Postmaster General, 381 U.S. 301, 309 (1965) (Brennan, J., concurring). See also Bantam Books v. Sullivan, 372 U.S. 58 (1963) (informal pressure may be just as effective in censoring speech as more direct methods). For the Commission to establish (and thereafter police) an official governmental ratings system, therefore, would be profoundly antithetical to First Amendment values.[8]

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[8] The Supreme Court's decision in FCC v. Pacifica, 438 U.S. 726 (1978), does not provide a constitutional basis for FCC-prescribed ratings. The Court in Pacifica, while approving the Commission's rule channeling "indecent" language on radio to late-night hours, emphasized the narrowness of its holding. Id. at 750. By contrast, the categories of sexual and violent content that would be targeted by an FCC-prescribed ratings scheme are much broader and vaguer than the

II. SOCIAL SCIENCE STUDIES OR GENERALLY HELD OPINIONS THAT VIOLENCE ON TELEVISION CAUSES BAD ATTITUDES OR BEHAVIOR CANNOT JUSTIFY A GOVERNMENT RATINGS SCHEME

Congress, and many of the commenters in this proceeding, rely on social science evidence that is said to prove beyond doubt a causative link between violence in the media and aggressive behavior or attitudes. The ACLU does not intend to wade into that debate here, except to note that the social science evidence is in fact ambiguous and inconclusive; that the definitions of "violent" content, and "aggressive" attitudes or behavior, are vague and shifting; and that the effects of art and entertainment on human beings are more various, complex, and idiosyncratic than some political leaders or social scientists would suggest.[9]

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vulgar words at issue in Pacifica; the ratings system would have the effect of restricting programming, not merely channeling it; the ratings system would require subjective and constitutionally dubious judgments about "good" and "bad" violence; and it would govern not only broacasting but cable television, a medium over which the FCC has much more restricted powers.

[9] The New York City Bar Association's recent report contains an excellent summary of the social science evidence and notes the following fallacies of legislative reliance on psychological studies:

> First, most psychological studies of the effects of television are studies of aggression and aggressive attitudes, not violence. The distinction is significant: many behaviors which few would deem "violent" may be counted and measured by psychologists as aggressive. Yet the purported focus of most legislative efforts is violent behavior caused by media content. It would therefore be erroneous to rely on psychological studies of aggression to justify such regulations. Second, the research studies are generally influenced by more fundamental, underlying conceptions of the causes of human social behavior -- issues on which there is little agreement. For example, theorists who believe that behavior is learned by children from what they observe are more inclined to construct studies focusing on television or media than theorists who place more weight on the child's family structure or position in a social pecking order.
>
> Third, determining psychological causation is problematic, difficult and the subject of a considerable amount of disagreement. The empirical findings normally speak in terms of correlation of events and not causation; the researchers' findings are usually carefully limited and, in general, do not make broad or definitive assertions about the causes of particular behavior. For many reasons, generalizing from research results to everyday experience can be perilous. It is difficult, for example, for psychologists to duplicate the mix and range of violent and nonviolent programming that an individual may choose. There is also great variation in the population viewing violent programming: some persons may be unusually susceptible to imitation of violent media portrayals, and research populations may be skewed by over-representation of such individuals. It is also difficult to isolate everyday viewing of violent media portrayals from other experiences that psychologists believe may contribute to violent behavior. There is no consensus among even the researchers who have found some correlations that there is any

The point that the ACLU wishes to stress here is a more basic one. Whether relying upon social science studies, or general "common sense" beliefs that violent or sexual subject matter in the media has adverse effects on attitudes and behavior, our most fundamental First Amendment ideals bar government from regulating speech because it is thought to have a "bad tendency" or give people "bad ideas." Short of "obscenity" (hard-core prurient material without any serious value), or "incitement" or "fighting words" (violent speech intended and likely to produce an immediate violent response), the government cannot restrict art, entertainment, or other expression on controversial subjects on the theory that it may cause people to adopt antisocial attitudes, behave badly, or become fearful.[10] Indeed, if the law were otherwise, virtually any work of art, entertainment, or news reporting could be banned. One obvious target would be the Bible, which contains extensive descriptions of violence.

Because the entire concept of free speech depends upon rejecting the temptation to restrict expression because of its possible tendency to encourage bad thoughts or acts, the Supreme Court has ruled many times that government cannot pass laws "aimed at the suppression of dangerous ideas." Speiser v. Randall, 357 U.S. 513, 516 (1958). On the contrary, as Justice Kennedy recently wrote, "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression,

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clear causal link between media violence and violent behavior.

"Violence in the Media," The Record of the Association of the Bar of the City of New York, Vol. 52, No. 3 (April 1997), pp. 296-97.

[10] Some of the literature on media violence emphasizes its fear-inducing, rather than aggression-inducing, effects. E.g., George Gerbner, Larry Gross, Nancy Signorelli, & Michael Morgan, "Television's Mean World: Violence Profile No. 14-15," (Univ. of Penn., Annenberg School of Communications, Sept. 1986).

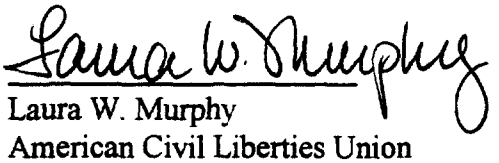
consideration, and adherence. Our political system and cultural life rest upon this ideal." Turner Broadcasting v. FCC, 114 S.Ct. 2445, 2465 (1994). Whatever harms are thought to be caused by speech that is, in the words of '551, "indecent" or "violent," the remedy cannot be censorship, whether direct or subtle. Any other answer, as Judge Frank Easterbrook of the U.S. Court of Appeals wrote in connection with a law designed to suppress sexually explicit "degrading" ideas about women, "leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us." American Booksellers Association v. Hudnut, 771 F.2d 323, 330 (7th Cir.), aff'd, 475 U.S. 1001 (1985).

Conclusion

The ACLU does not wish to minimize the serious and deeply felt concerns of many parents and political leaders about the possible adverse effects on children of violent or sexual content in the mass media. But solutions to the dilemma must be found outside the realm of government restrictions, including labeling schemes. Media literacy, promotion of educational programming, and reviews and information combined with technology that enables parents truly to make their own decisions, are alternatives that would not offend core First Amendment values. In the last analysis, violence and sex are dramatic, consistent themes in human life and history, and like other controversial subjects, need to be confronted and discussed rather than

suppressed, whether through direct censorship laws or through more indirect, convoluted governmental ratings systems.

Respectfully submitted,



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